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IN THE

Supreme Court of the United States

October Term, 1982

JEFFRY W. LOCHNER,

Petitioner, Plaintiff,

vs.

UNITED STATES OF AMERICA,

Respondent, Defendant.

PETITION OF JEFFRY W. LOCHNER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Where the United States develops a campground on a stream in the State of California and advertises to the public that an attraction of the campground is swimming, may a court properly grant summary judgment in favor of the United States against plaintiff, quadriplegic, when California Health and Safety Code sections 24050-24053 require the developer of such a resort to 1) sound for danger, 2) post warning signs, and 3) stretch safety ropes around rocks and obstructions in the stream, and the uncontroverted evidence establishes a failure of the United States to sound for, post warning signs of, or stretch safety ropes around the submerged rock upon which plaintiff struck his head while diving into the swimming hole in the stream adjacent to the campground?

2. May a court fail to follow the law of its circuit, which holds that California Health and Safety Code sections 24050-24053 apply to the conduct of the United States where it develops a public swimming place on a river or a stream, by ignoring the uncontroverted facts established by plaintiff and conclude that the Salt Creek Campground is not on Salt Creek and that the swimming hole, which is the only place to swim while using the campground, is not an amenity to the campground?

3. Does California Civil Code section 846, which was applied by the court rather than Health and Safety Code sections 24050-24053, deny plaintiff equal protection of the law in that it immunizes a defendant from liability for his negligent conduct, limiting liability to a willful failure to guard or warn of a known

dangerous condition solely on the criteria of whether a recreational user of land furnishes a consideration in its use?

4. Since California law does not require an intent to injure for conduct to be willful, and liability for willful conduct under California Civil Code section 846 may be imposed for actions done with a wanton or reckless disregard of the possible results, may a court properly grant summary judgment where the uncontroverted evidence established that an employee of the United States charged with the safety of the public in the use of the campground recreational facilities 1) swam in the swimming hole adjacent to the campground, 2) knew of submerged rocks in the swimming hole, 3) personally avoided the rocks in the swimming hole, 4) knew that the public, local residents and others, used the swimming hole, and 5) knew that users of the swimming hole dived from rocks surrounding the swimming hole, yet failed to warn of the hazard of the submerged rocks or report to any of his supervisors that such a warning be posted?

5. On a summary judgment motion, may a court elect to try issues of fact, rather than consider whether issues of fact exist which merit a trial, and, despite the existence of genuine issues of fact established by plaintiff, ignore the facts which would impose liability upon defendant and grant summary judgment for defendant?

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Point One The limits of summary judgment procedure have been so seriously ignored that this Court should exercise its supervisory power under Supreme Court Rule 17.1(a) and forbid the encroachment on the right to trial on issues of fact. 13

1. The circuit court exceeded the limits of summary judgment procedure by trying issues of fact on a summary judgment motion rather than determining whether issues of fact existed for trial. Although the uncontroverted facts established that, in its brochure describing Salt Creek Campground, the United States advertised creek water as a facility of the campground and swimming as one of its attractions, the circuit court erroneously concluded that Salt Creek Campground is not on Salt Creek, that the natural swimming hole adjoining the campground is not an amenity to the campground and improperly ruled that California Health and Safety Code sections 24050-24053 were not applicable. 13

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Point Two The circuit court's holding that California Civil Code Section 846, which limits a landowner's duty of care to a recreational user solely on the criteria of whether a recreational user furnishes a consideration, does not violate the equal protection provisions of the United States and California Constitutions is in conflict with the holding of the California Supreme Court. In *Brown v. Merlo,* 8 Cal. 3d 855, 866-867, 106 Cal. Rptr. 388, 396-397, 506 P. 2d 211, 220-221, (1973) the court held that a statute based on such criteria is violative of the equal protection guarantees of both the United States and California Constitutions. Because of this conflict, this Court, based on Supreme Court Rule 17.1(a), should grant certiorari. 19

Point Three The circuit court, as did the district court, in concluding that there was simply no evidence of any willful failure to guard or warn to impose liability under California Civil Code section 846, has so far departed from the accepted and usual course of judicial procedures on summary judgment motions as to call for an exercise of this Court's power of supervision under Supreme Court Rule 17.1(a). 24

1. To constitute willfulness within Civil Code section 846, plaintiff need not show that defendant intended to injure; it is sufficient to show that defendant conducted itself with a wanton and reckless disregard of the possible consequences of its action. The court misconstrued the standard and failed to recognize that plaintiff's evidence, which established the United States' knowledge of the dangerous condition and its willful failure to guard or warn, was sufficient to present, at least, a triable issue of fact. 24

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PETITION OF JEFFRY W. LOCHNER FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

OPINION BELOW

The District Court for the Northern District of California heard arguments on defendant's and plaintiff's motions for summary judgment and rendered its oral opinion on December 5, 1980. (Appendix A) Without issuing a written memorandum opinion, the court granted defendant's motion for summary judgment. (Appendix B) Judgment for defendant was entered on December 18, 1980. (Appendix C) The Court of Appeals for the Ninth Circuit, by its unpublished memorandum, affirmed the District Court's decision. (Appendix D)

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on November 8, 1982, and is appended to this petition as Appendix D. A timely petition for rehearing was denied and suggestion for hearing en banc rejected and entered by that court on January 4, 1983. (Appendix E) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Since plaintiff is challenging the constitutionality of California Civil Code section 846, 28 U.S.C. § 2403(b) may be applicable, and no court of the United States as defined by 28 U.S.C. § 451 has certified to the California Attorney General, pursuant to 28 U.S.C. § 2403(b), the fact that the constitutionality of California Civil Code section 846 was drawn in question.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Petitioner's action against the United States is under the Federal Tort Claims Act, 28 U.S.C. § 1346(b), set forth in Appendix F at page 3.

The statutory provisions petitioner contends applicable to the United States under California law are sections 24050-24053 of the Health and Safety Code, which provide:

> "§ *24050. Resort defined.* 'Resort,' as used in this article, means any public bathing or swimming place or resort on a river or stream."
>
> "§ *24051. Soundings for dangers.* No person shall maintain a resort unless he carefully sounds for depth of water and locates the eddies and pools and determines the presence and nature of dangerous currents, sunken logs, rocks, and obstructions in the stream or river."
>
> "§ *24052. Warning signs.* No person shall maintain a resort unless signs indicating in plain letters the depth of water, the location of pools or eddies, and the presence and direction of currents of water are placed and maintained in the water during the season when bathing and swimming are permitted or invited."
>
> "§ *24053. Safety ropes.* No person shall maintain a resort unless safety ropes are stretched wherever necessary to show the line of eddies, pools, sunken obstructions, and other hidden dangers to bathers in the water."

The statutory provision applied by the District Court for the Northern District of California and by the Ninth Circuit Court of Appeals is California Civil Code section 846, which is set forth in Appendix F at

pages 3-4. Petitioner challenges the constitutionality of California Civil Code section 846, contending that it denies petitioner the equal protection guarantees of the United States Constitution, Amendment XIV, Section 1, and the California Constitution, Article 1, Sections 7(a) and 7(b), which are set forth in Appendix F at pages 1-3.

STATEMENT OF THE CASE

FACTS

Plaintiff, petitioner, sought recovery under the Federal Tort Claims Act for injuries of quadriplegia sustained when he struck his head on a submerged rock while diving into a natural swimming hole located in Salt Creek adjacent to Salt Creek Campground in the Six Rivers National Forest in the State of California.

The area is owned and controlled by the United States. The United States developed Salt Creek Campground in a wilderness setting, installing barbeque pits, or stove-type cooking facilities, picnic tables, garbage and toilet facilities. The Forest Service literature which describes the rustic camps in the Six Rivers National Forest advertises swimming as one of the attractions of the Salt Creek Campground. The brochure also advertises creek water as one of the facilities of the campground. (See Appendix G, p. 3)

Plaintiff was using the swimming hole, for the first time, in the company of two friends, John and Rob Klem, who had frequented the campground and swimming facility with their family on numerous occasions.

The natural swimming hole is located in close proximity to the campground. It can be reached by a tractor road that leads from the campground for a distance of 200 feet down Salt Creek to a foot trail. The trail leads down a distance of 100 feet to a sandy beach where the swimming hole may be entered. (See Appendix H, Map of Salt Creek Campground and Swimming Hole.) The trail, regularly used by rangers and the public to approach the swimming hole, is plainly visible and is the most accessible way to get to the swimming area.

At the end of the swimming hole, a rock formation crosses the swimming area forming a natural rock dam. A submerged rock outcropping is located to the right of the dam and inside the swimming pool area.

After arriving at the campground, plaintiff and the Klems walked from the campground down the trail to the swimming hole. They noticed several people in the pool and swam downstream to the natural rock dam where they sunned themselves for a period of time. On re-entry into the water, John Klem dived into the water first followed by Rob Klem. Plaintiff looked into the water before diving in. The water was murky, and he could not see the bottom, but there did not appear to be anything in the way. Since John and Rob Klem had dived into the water before him, it appeared safe to plaintiff to follow. John was in the water, and Rob was standing about two feet from him in the water. Plaintiff dove in, striking his head on a rock which was about one foot below the water, breaking his neck and rendering him a permanent quadriplegic.

Mr. Arden Kenneth Stillwell had been employed by the United States Forest Service for 16 years and throughout that time had worked in the Mad River Ranger District where the campground and swimming hole are located. Part of Mr. Stillwell's job as a forest ranger was to ensure the safety of the public using any forest land for recreation.

Mr. Stillwell resided and was raised in Zenia, which is approximately 12 miles from the campground. Over the period of 32 years he had lived in the area, he used the Salt Creek swimming hole twice-a-week in the summer. As a child he and his family made frequent outings to Salt Creek to swim. He grew up with other families that also used the swimming area. Mr. Stillwell, his wife, and three children normally used the swimming hole in the summer months.

Mr. Stillwell knew people from Zenia who used the swimming hole and had seen others that he did not know at the swimming hole. The swimming hole is popular, because there is water there throughout the summer months and there are no other good swimming holes in the area.

Mr. Stillwell had observed people diving into the swimming hole from a boulder area near the beach and had himself dived into this area. He identified additional rock outcroppings, at an estimated height of 10 feet, from which he had seen people dive.

Mr. Stillwell was aware of the dam-like rock formation across the swimming hole, and, in his use of the swimming area, had swum up to this area and sat there and had seen others do the same. He was aware

of the submerged rocks in the swimming area near the dam-like rock formation, had known of their location since he was a child and avoided them.

Mr. William H. German was also employed by the United States Forest Service as a forest ranger during the period of time when the injury to plaintiff took place. One of his obligations as a Resource Forester was to inspect campgrounds for safety. His normal practice and custom was to check Salt Creek Campground once a month. During these inspections, he had seen locals, loggers and others he did not recognize as locals at the camp site. Mr. German had also seen swimmers in the swimming hole when he visited the campground, or had observed people around the swimming hole as he passed on the highway.

During his employ in the Six Rivers National Forest at Mad River Ranger Station, Mr. German was aware that there were submerged rocks in the swimming hole which could be seen at certain times of the year, depending on the clarity of the water. He was aware of, and identified, the dam-like barrier at the end of the swimming hole and the bedrock protrusions.

There was not, nor had there ever been, a sign of any kind which restricted diving or swimming or warned of any dangers associated with such activities at Salt Creek Campground. The submerged rock outcroppings had never been physically marked by a marker or buoy of any kind alerting one to the presence of submerged rocks in the swimming area. The foot trail leading to the swimming area had never been blocked off to prevent access to the swimming hole.

Although Mr. Stillwell was aware of the existence of submerged rocks in the swimming hole, knew of its popularity as a swimming area and had observed people diving there, he had never suggested or recommended to his supervisors, or anyone, that a warning regarding the rocks be posted, or that the rock outcropping be marked by some type of marker or buoy.

Despite the awareness of Mr. German and other rangers of the use of Salt Creek swimming hole as a swimming facility, no one had ever surveyed the swimming area to determine the depth, length, location of rock formations, or anything of that nature. Nor, during Mr. German's service at the Mad River Forest Ranger Station, had anyone suggested or discussed the advisability of posting any type of sign warning of the dangers of diving or swimming at Salt Creek.

MOTIONS FOR SUMMARY JUDGMENT BEFORE THE DISTRICT COURT

Defendant, respondent, moved for summary judgment before the District Court for the Northern District of California, asserting that California Civil Code section 846 (recreational use statute) precluded the imposition of liability upon defendant, contending that plaintiff was a gratuitous recreational user of defendant's land and that there was no evidence of its willful failure to guard or warn of a dangerous condition.

Plaintiff challenged the sufficiency of defendant's declarations claiming to deny the existence of fact and objected to defendant's motion. Plaintiff filed a counter motion for summary judgment on the issue of liability and presented declarations which established the evi-

dentiary facts which supported his contention that the United States' conduct, in the development of Salt Creek Campground on the banks of Salt Creek to take advantage of the creek and its natural swimming hole, was regulated by Health and Safety Code sections 24050-24053, and that it had breached the duty imposed by these sections.

Alternatively, if it were found that Health and Safety Code sections were not applicable, plaintiff contended that California Civil Code section 846, which exempts owners from liability for injuries to gratuitious recreational users of their property unless the owners willfully fail to guard or warn against a dangerous condition, violated the equal protection guarantees of the Federal and State Constitutions.

Plaintiff alleged that, even if Civil Code section 846 was constitutional, defendant's conduct was sufficient to establish that it willfully failed to guard or warn of a known danger of submerged rocks.

DISTRICT COURT'S DECISION

The district court, without issuing a memorandum opinion, granted defendant's motion for summary judgment. (Appendix A, pp. 12-13) The court ruled that "in no way possible" did the campground with its adjoining swimming area come within the definition of a resort under California Health and Safety Code and that it was precisely the "thing" covered by Civil Code section 846. (Appendix A, p. 12)

The district court further held that the burden of plaintiff was to establish a willful or malicious failure to guard or warn, and that there was no suggestion

that any such evidence was available in this case. (Appendix A, pp. 10-12)

PLAINTIFF'S AUTHORITY

In support of his contention that the United States breached a duty of care imposed by the California Health and Safety Code, plaintiff relied on *Donaldson v. United States*, 653 F. 2d 414 (9th Cir. 1981), where the court held that California Health and Safety Code sections 24050-24053 were applicable to the activities of the United States when it developed a facility on a river or stream where the public may bathe or swim.[1]

In challenging the constitutionality of Civil Code section 846, plaintiff relied on the holding of the California Supreme Court in *Brown v. Merlo*, 8 Cal. 3d 855, 866-867, 106 Cal. Rptr. 388, 396-397, 506 P. 2d 211, 220-221 (1973), which held that a statute which removes the protection from negligently inflicted injury simply because one is a non-paying user is unconstitutional.

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[1]*Donaldson v. United States* was decided after the proceedings in the district court and was cited to the Ninth Circuit in plaintiff's closing brief, since it was decided subsequent to plaintiff's opening brief. In the proceeding before the district court, plaintiff relied on *Miller v. United States*, 442 F. Supp. 555 (N.D. Ill. 1976), affirmed 597 F. 2d 614 (7th Cir. 1979). In *Miller*, the facts were remarkably similar to the facts of plaintiff's case and involved the construction of the applicability of similar Illinois statutes. There the court held that the Illinois recreational use statute did not control the conduct of the United States when it developed land providing swimming facilities. *Donaldson, supra,* was consistent with the analysis of the court in *Miller* and held that the California Health and Safety Code sections took precedence over the recreational use statute when the United States developed a facility on a river or stream where swimming was available.

In support of his alternative argument that defendant's conduct established a willful failure under Civil Code section 846, plaintiff relied on *Simpson v. United States*, 652 F. 2d 831 (9th Cir. 1981), which held that, under the statute, willfulness may be established by a showing of wanton conduct done with reckless disregard of the possible consequences.

DECISION OF THE NINTH CIRCUIT

The Ninth Circuit acknowledged the decision of *Donaldson v. United States*, *supra*, 653 F. 2d 414, however, concluded that Salt Creek Campground, developed and maintained by the Forest Service, is not located on a river or stream, stating that the campground is 300 feet from the creek. It also concluded that the swimming hole was not an amenity to the campground, that there was no apparent connection between the campground and the natural swimming hole and thus, unlike *Donaldson*, the campground was not developed on a river or stream and Health and Safety Code sections 24050-24053 were not applicable. (Appendix D, p. 2)

In rejecting plaintiff's equal protection challenge to Civil Code section 846, the court stated that the identical equal protection challenge had been made and rejected in *Simpson v. United States*, *supra*, 652 F. 2d 831, *Parish v. Lloyd*, 82 Cal. App. 3d 785, 147 Cal. Rptr. 431 (1978) and *Lostritto v. Southern Transportation Co.*, 73 Cal. App. 3d 737, 140 Cal. Rptr. 905 (1977). (Appendix D, p. 2)

In rejecting plaintiff's contention that there was a genuine issue of material fact as to the willful failure

of the United States to guard or warn against a dangerous condition if Civil Code section 846 applied, the court stated that plaintiff misunderstood the standard. (Appendix D, p. 3)

The court acknowledged that *Simpson v. United States, supra,* 652 F. 2d at 834, held that intentional or wrongful conduct to establish willfulness under Civil Code section 846 is conduct done either with a knowledge that a serious injury to another will probably result, or with wanton or reckless disregard of the possible results. The court further acknowledged that plaintiff's evidence established that employees of the United States knew that 1) the swimming hole was used, particularly by local residents, throughout the summer, 2) there were potentially dangerous rocks at one end of the swimming hole, 3) some people jumped into the pool in the vicinity of the rocks, and 4) that the forestry workers had failed to sound for the presence of submerged rocks or to place a sign warning of the danger of diving into the water where rocks might be, but, without discussion, concluded that there was not sufficient evidence of any sort of willful failure to guard or warn. (Appendix D, p. 3)

REASONS FOR GRANTING THE WRIT

POINT ONE

THE LIMITS OF SUMMARY JUDGMENT PROCEDURE HAVE BEEN SO SERIOUSLY IGNORED THAT THIS COURT SHOULD EXERCISE ITS SUPERVISORY POWER UNDER SUPREME COURT RULE 17.1(a) AND FORBID THE ENCROACHMENT ON THE RIGHT TO TRIAL ON ISSUES OF FACT.

1. The circuit court exceeded the limits of summary judgment procedure by trying issues of fact on a summary judgment motion rather than determining whether issues of fact existed for trial. Although the uncontroverted facts established that, in its brochure describing Salt Creek Campground, the United States advertised creek water as a facility of the campground and swimming as one of its attractions, the circuit court erroneously concluded that Salt Creek Campground is not on Salt Creek, that the natural swimming hole adjoining the campground is not an amenity to the campground and improperly ruled that California Health and Safety Code sections 24050-24053 were not applicable.

Summary judgment should be entered only when pleadings, depositions, affidavits, and admissions filed

in a case show no genuine issue as to any material fact. *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 467 (1962). On a motion for summary judgment, the role of the court is limited. It does not try factual issues, but must determine instead whether any such issues exist to be tried. *Soria v. Oxnard School District Board of Trustees*, 488 F. 2d 579, 586 (9th Cir. 1973); cert. denied, 416 U.S. 951 (1973). A summary judgment is proper only when the moving party is entitled to a judgment as a matter of law, where it is clear what the truth is and where no genuine issue remains for trial, for the purpose of the rule is not to cut litigants off from their right to trial if they have issues to try. *Poller v. Columbia, supra*, 368 U.S. at 467.[2]

In *Donaldson v. United States*, 653 F. 2d 414 (9th Cir. 1981), the court held that California Health and Safety Code sections 24050-24053 were applicable to the United States when it developed a facility on a river or stream where the public might bathe or swim, even if such recreational activity was a secondary or tertiary function of the facility. *Id.* at 417.

The circuit court recognized *Donaldson*, but, rather than remand the matter back to the district court for a

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[2]In *Poller*, the plaintiff was entitled to trial by jury. Since the case at hand is a proceeding under the Federal Tort Claims Act, plaintiff has no jury right, and issues of fact would be tried before a judge. This does not serve as justification for a court, on review of a summary judgment motion, to adopt the function of the trial court and try issues of fact. In the trial of an issue of fact, the credibility of a witness is determined by viewing the manner of his testimony, which vitally assists in reaching a conclusion of the veracity of the witness. Mere affidavit testimony does not permit such analysis. *Sartor v. Arkansas Natural Gas Corporation*, 321 U.S. 620, 627-628 (1944).

determination of whether or not Salt Creek Campground is located on Salt Creek, erroneously concluded that, contrary to the evidence presented, the campground is not located on Salt Creek, stating that the campground is 300 feet from the creek thus not located on a stream. Such a conclusion is wrong and contrary to the evidence presented by plaintiff's declarations. The circuit court further erroneously concluded that the swimming hole located in Salt Creek is not an amenity to Salt Creek Campground. The material facts established by plaintiff's declaration show:

1) Salt Creek Campground is on Salt Creek. The map of the Forest Service (attached to the declaration of the United States and to the appendix of the reply brief of appellant) depicts Salt Creek Campground and Salt Creek. The map shows that Salt Creek touches the northern and western boundaries of the campground. The map itself is entitled, "Map of Salt Creek Campground and Swimming Hole." (Appendix H)

2) Trinity County Road 520, which leads to and cuts across the campground, bridges Salt Creek at the entrance to the campground. (Appendix H).

3) It is the swimming hole, not the creek, that is a distance of 300 feet from the campground. The swimming hole is clearly visible from the paved road which leads to the campground. It is easily accessible from the campground by a tractor road which leads from the campground for a distance of 200 feet to a foot trail which leads down a distance of 100 feet to a sandy beach where the swimming hole may be entered.

4) The campground itself is named "Salt Creek," thus the campground's name identifies it with the creek.

5) Defendant's brochure, which identifies the rustic camps in the Six Rivers National Forest and was attached to defendant's declaration and to the reply brief of appellant, advises that one of the attractions of Salt Creek Campground is swimming. It also advises that one of the facilities of the campground is creek water. (Appendix G, p. 3)

The name of the campground, visibility of the swimming hole and its easy access establish that Salt Creek swimming hole is part of the campground. The government's brochure, in fact, establishes that the government considers it part of the campground, for it advises users of the campground that one of it attractions is swimming, and the only available swimming area adjacent to the campground is the natural swimming hole in Salt Creek. Thus, Salt Creek swimming hole is an amenity to the campground. The court's conclusion that it is not is contrary to these material facts and is based on an erroneous conclusion that the stream is 300 feet from the campground.

Contrary to the court's conclusion that there is no apparent connection between the primitive campground and the natural swimming hole, the evidence clearly established that the campground is located on Salt Creek. The creek, with its natural swimming hole,

merited placing the campground in this particular location.

The district court did not hold that the campground was not on the stream. Rather, the court concluded that the campground, with its minimal facilities, and swimming hole approximately 300 feet away were in a natural setting, and that, in no way, was it possible to describe the facility as a resort under the Health and Safety Code. Such a conclusion is directly contrary to the holding of the court in *Donaldson v. United States*, *supra*, 653 F. 2d 414.[3]

The circuit court committed a grave miscarriage of justice, exceeding the limits of summary judgment procedure by improperly trying issues by fact, reaching a conclusion contrary to the facts established by plaintiff's declarations, resulting in a failure to apply the controlling law of *Donaldson*, *supra*, 653 F. 2d 414. If the declaration evidence presented an issue of whether or not Salt Creek Campground is on

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[3]The only California authority on the construction and application of Health and Safety Code sections 24050-24053 is the opinion of The California Attorney General. 27 Ops. Atty. Gen. 113 (1956). The question presented there was whether or not a picnic ground bordering on a stream, where swimming or bathing was not part of the operation of said picnic ground, fell within the definition of a "resort" as set out in section 24050 of the Health and Safety Code. In analyzing the code section and the intent of the Legislature, the opinion concluded that the picnic ground would come within the definition of a resort, even if the owner or operator thereof did not have swimming or bathing as a part of the operation of the picnic ground, if he had knowledge that swimming or bathing was taking place in connection with the picnic ground and failed to take action to prevent such swimming or bathing. *Id.* at 114-115. The facts in the case at hand establish that the United States not only knew that people using the campground swam in the swimming hole, but advertised swimming as an attraction of the campground.

Salt Creek and whether swimming is an attraction of the campground, it, minimally, was an issue of fact to be resolved in a full trial.[4] Furthermore, the uncontroverted facts established that the campground is on Salt Creek and that the swimming hole is an amenity to the campground. Thus, the court should have granted plaintiff's motion for limited summary judgment on the issue of liability based on the failure of the United States to comply with the requirements of California Health and Safety Code. *Donaldson v. United States, supra*, 653 F. 2d 414.

[4]In *Donaldson*, the court expressly held that the issue of whether a facility was part of a river or stream was a material issue of fact to be determined by the trial court on remand in applying Health and Safety Code sections 24050-24053. *Donaldson, supra*, 653 F. 2d at 418.

POINT TWO

THE CIRCUIT COURT'S HOLDING THAT CALIFORNIA CIVIL CODE SECTION 846, WHICH LIMITS A LANDOWNER'S DUTY OF CARE TO A RECREATIONAL USER SOLELY ON A CRITERIA OF WHETHER A RECREATIONAL USER FURNISHES A CONSIDERATION, DOES NOT VIOLATE THE EQUAL PROTECTION PROVISIONS OF THE UNITED STATES AND CALIFORNIA CONSTITUTIONS IS IN CONFLICT WITH THE HOLDING OF THE CALIFORNIA SUPREME COURT. IN BROWN v. MERLO, 8 CAL. 3d 855, 866-867, 106 Cal. Rptr. 388, 396-397, 506 P. 2d 211, 220-221 (1973), THE COURT HELD THAT A STATUTE BASED ON SUCH CRITERIA IS VIOLATIVE OF THE EQUAL PROTECTION GUARANTEES OF BOTH THE UNITED STATES AND CALIFORNIA CONSTITUTIONS. BECAUSE OF THIS CONFLICT, THIS COURT, BASED ON SUPREME COURT RULE 17.1(a), SHOULD GRANT CERTIORARI.

Plaintiff's specific equal protection challenge to California Civil Code section 846 is based on the fact that it protects the gratuity of a landowner, condition-

ing his duty solely on a consideration of whether or not a recreational user of his land has paid a fee.

The constitutionality of Civil Code section 846 has not been considered by the California Supreme Court. The basis of the constitutional challenges before the lower state and federal courts, which have upheld the constitutionality of the statute, differ from that presented by plaintiff in this case.[5] Thus plaintiff's particular challenge presented a question of first impression to be determined by the district court and circuit court of appeals. When confronted with a situation not yet met by the California Supreme Court, the district court and circuit court should have determined how the state's highest court would have decided the issue. *Commercial Union Insurance Co. v. Ford Motor Co.*, 640 F. 2d 210; cert. denied, 102 S. Ct. 310 (1981); *Tkahashi v. Loomis Armored Car Service*, 625 F. 2d 314, 316 (9th Cir. 1980). However, this was not done.

[5]In *Lostritto v. Southern Pac. Transp. Co.*, 73 Cal. App. 3d 737, 747-749, 140 Cal. Rptr. 905, 910-911 (1977), the constitutional attack was an underinclusion/overinclusion argument, and the reasoning of *Brown v. Merlo, supra,* was not asserted. In *English v. Marin Mun. Water Dist.*, 66 Cal. App. 3d 725, 730-731, 136 Cal. Rptr. 224, 227-228 (1977), plaintiff did not attack the constitutionality of the Act. In *Parish v. Lloyd*, 82 Cal. App. 3d 785, 147 Cal. Rptr. 431 (1978), it does not appear that plaintiff asserted the point that plaintiff is making here. In addition, the court in *Parish* erroneously interpreted *Brown,* for, in stating its reasons why the legislative scheme of § 846 was proper, it stated: "Where a user pays to use the property the owner remains liable; but, where the user is a trespasser he must assume the risk of tort liability. This is a valid distinction directly related to the state's purpose of encouraging private landowners to grant recreational access." *Id.* at 788. This is directly contrary to the California Supreme Court's holding in *Brown* and is precisely why the court in *Brown* found the guest statute unconstitutional. See *Brown v. Merlo, supra,* 8 Cal. 3d at 866-867, 106 Cal. Rptr. at 396-397, 506 P. 2d at 220-221. *Simpson v. United States,* 652 F. 2d 831 (9th Cir. 1981), relied on *Parish* which has been distinguished.

The district court did not even discuss the constitutional issue. The circuit court failed to acknowledge and discuss the particular basis on which plaintiff was challenging the statute and rendered its decision in direct conflict with the reasoning of the California Supreme Court when it considered the constitutionality of a similarly based statute which made a like classification. *Brown v. Merlo, supra,* 8 Cal. 3d at 866-867, 106 Cal. Rptr. at 396-397, 506 P. 2d at 220-221. The circuit court upheld the constitutionality of the statute, relying on *Simpson v. United States,* 652 F. 2d 831 (9th Cir. 1981), *Parish v. Lloyd,* 82 Cal. App. 3d 785, 147 Cal. Rptr. 431 (1978), and *Lostritto v. Southern Pacific Transportation Co.,* 73 Cal. App. 3d 737, 140 Cal. Rptr. 905 (1977). These cases are not controlling and are distinguishable. (See footnote 5 to this petition.)

In support of his constitutional challenge, plaintiff relies on the analogous case of *Brown v. Merlo, supra,* 8 Cal. 3d 855, 106 Cal. Rptr. 388, 506 P. 2d 211. There the court considered the constitutionality of the California guest statute, which denied a passenger the right to sue his negligent host driver unless he furnished a consideration or there was willful misconduct on the part of the driver. In holding that the hospitality and gratuity of the host driver did not serve as a constitutional basis for the classification and was thus violative of the equal protection of the state and federal constitutions, the California Supreme Court stated:

> "Not only do we find no reasonable basis to draw a distinction between the automobile guest and other guests, but, as we shall show, the generosity of the host does not constitute a rational

basis for removing a guest's protection from negligently inflicted injuries. As Justice Harlan observed in his dissent in *Glona v. American Guarantee Co.*, 391 U.S. 73 (1968), *some 'classifications are impermissible [under the equal protection clause] because they bear no intelligible proper relation to the consequences that are made to flow from them.' Insofar as the guest statute removes a passenger's protection from negligently inflicted injury simply because he is a non-paying guest, we think the provision exhibits the unconstitutional vice to which Justice Harlan alluded.*

. . . .

". . . The claimed invidiousness of the guest statute lies not in the fact that it draws some distinction between paying and non-paying passengers, but rather in the fact that it penalizes guests by wholly depriving them of protection against negligent injury.

". . . [*N*]*o principle in our legal system dictates that one must pay a fee before he is protected from infliction of negligent injury.* Indeed, our general state policy, embodied in Civil Code section 1714, provides the exact opposite. That section declares: 'Evey one is responsible, not only for the result of his willful acts, but also for an injury occasioned to another by his want of ordinary care or skill in the management of his property or person . . .' Given this underlying legal principle, '[t]he fact that the guest pays nothing for riding with the owner furnishes no reason why the negligence of the latter should be excused.'" *Brown v. Merlo, supra*, 8 Cal. 3d at 866-867, 106 Cal. Rptr. at 396, 506 P. 2d at 220 (emphasis added).

In construction of state constitutional issues, the views of the highest state court concerning the purpose, scope and operative effects of the California Constitution are to be given careful consideration. *Reitman v. Mulkey*, 387 U.S. 369, 373-374 (1967). The circuit

court's failure to do so justifies that this court, in the exercise of its supervisory powers under Sup. Ct. R. 17.1(a), grant plaintiff's petition for writ of certiorari.

In *Brown, supra*, 8 Cal. 3d 855, 106 Cal. Rptr. 388, 506 P. 2d 211, the court also found that a statute's classification based solely on the dictates of a monetary consideration violated the equal protection provisions of the Federal Constitution. Thus, the decision of the circuit court is in direct conflict with the analysis of the highest court of a state on the federal constitutional issue, and this additional conflict serves as a further basis for this court to grant the writ under Sup. Ct. R. 17.1(a).

POINT THREE

THE CIRCUIT COURT, AS DID THE DISTRICT COURT, IN CONCLUDING THAT THERE WAS SIMPLY NO EVIDENCE OF ANY WILLFUL FAILURE TO GUARD OR WARN TO IMPOSE LIABILITY UNDER CALIFORNIA CIVIL CODE SECTION 846, HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEDURES ON SUMMARY JUDGMENT MOTIONS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION UNDER SUPREME COURT RULE 17.1(a).

1. To constitute willfulness within Civil Code section 846, plaintiff need not show that defendant intended to injure; it is sufficient to show that defendant conducted itself with a wanton and reckless disregard of the possible consequences of its action. The court misconstrued the standard and failed to recognize that plaintiff's evidence, which established the United State's knowledge of the dangerous condition and its willful failure to guard or warn, was sufficient to present, at least, a triable issue of fact.

In *Simpson v. United States*, 652 F. 2d 831 (9th Cir. 1981), the plaintiff sustained an injury when he fell

into a pool of boiling water at Inyo National Forest Recreational Area, California. The district court granted summary judgment, based on Civil Code section 846, finding there was no willful or malicious conduct. *Id.* at 832. The circuit court reversed, stating:

> "There is indeed an exception to California Civil Code § 846 regarding willfulness and maliciousness, which is defined as intentional, wrongful conduct done either with a knowledge that serious injury to another will probably result *or with wanton and reckless disregard of the possible results* (cite omitted) (emphasis added).
>
> "When willfulness is an issue, summary judgment should be granted with caution, since questions such as intent or motive are presented (cite omitted).
>
> "In this case the crucial facts regarding the type of warnings which were given, and thus the extent of the effort of the United States to protect against *known* dangers, was hotly disputed. Whether the efforts of the United States were so feeble as to rise to the level of willfulness is a material issue of fact which should have prevented summary judgment and which now warrants reversal (original emphasis)." *Simpson, supra*, 652 F. 2d at 834.

The circuit court recognized that where willfulness is an issue summary judgment should be granted with caution since questions of intent or motive are presented. (Appendix D, p. 3, citing *Simpson*). *However*, the circuit court misconstrued the standard of conduct necessary to establish willfulness and failed to apply the law to the facts. Plaintiff's declaration evidence established knowledge of the government (by its employees, Stillwell and German) of the dangerous condition and its failure to remedy this condition knowing

that members of the public use the swimming hole for recreational purposes. This evidence presented a sufficient triable issue of fact on the issue of willfulness.

Mr. Stillwell did not have to intend to injure anyone, or recognize that his conduct was reckless:

> " 'In order that the actor's conduct may be reckless, it is not necessary that he himself recognize it as being extremely dangerous. His inability to realize the danger may be due to his own reckless temperament or to the abnormally favorable results of previous conduct of the same sort. It is enough that he knows or has reason to know of circumstances which would bring home to the realization of the ordinary, reasonable man the highly dangerous character of his conduct.' " *Olea v. Southern Pacific Company*, 272 Cal. App. 2d 261, 266, 77 Cal. Rptr. 332, 335 (1969).

A reasonable man in charge of public safety at a campground who:

1) swam in the swimming hole at the campground,

2) knew of submerged rocks in the swimming hole,

3) personally avoided the rocks in the swimming hole,

4) knew that the public (local residents and others) used the swimming hole, and

5) knew users of the swimming hole dived from rocks surrounding the swimming hole

should, at the minimum, have reported to his supervisors that some warning be posted, either by sign or marker, to warn of the hazard. The failure of Mr. Stillwell to do so was sufficient conduct to constitute a

willful failure to guard or warn by a person charged with safety of the public on recreational land.

Mr. German, whose obligation as a Resource Forester was to inspect campgrounds for safety, was aware of the swimming hole next to Salt Creek Campground. He was aware that there were submerged rocks in the swimming hole which were not visible at certain times. He had seen individuals using the swimming hole, yet never took precaution to guard or warn of the submerged rocks.

The court's failure to acknowledge this evidence as presenting a triable issue of fact resulted from its misconstruction of the applicable standard of law covering a willful failure to guard or warn. One need not intend to cause injury, but merely act with wanton and reckless disregard of the possible consequences of his action. *Simpson v. United States, supra*, 652 F. 2d at 831.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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VINCENT R. RUOCCO,
Counsel of Record,

LAW OFFICE OF MICHAEL G. BRISKI,
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MICHAEL G. BRISKI,
Of Counsel,

Attorneys for Petitioner.

(Appendices follow)

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

JEFFRY W. LOCHNER,
Petitioner, Plaintiff,
vs.
UNITED STATES OF AMERICA,
Respondent, Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner, Jeffry W. Lochner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above case on November 8, 1982.

APPENDIX A

ORAL OPINION OF THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA ON ARGUMENT OF DEFENDANT'S AND PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT.

In the

UNITED STATES DISTRICT COURT

for the

NORTHERN DISTRICT OF CALIFORNIA

Before: HONORABLE ROBERT H. SCHNACKE, Judge

JEFFRY W. LOCHNER, *Plaintiff,* vs. UNITED STATES OF AMERICA, *Defendant.*	NO. C-80-0027 RHS

REPORTER'S TRANSCRIPT

FRIDAY, DECEMBER 5, 1980

Reported by: JOSEPH M. CASSINELLI, CSR

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BY: RICHARD DE SAINT PHALLE
ASSISTANT UNITED STATES ATTORNEY

FRIDAY, DECEMBER 5, 1980

The Clerk: Civil 80-27, Lochner vs. U.S.A., plaintiff's motion for partial summar judgment, and to strike, and defendant's motion to dismiss.

Appearances, counsel.

Mr. Ruocco: Vincent R Ruocco, R-U-O-C-C-O, for the plaintiff and responding party and moving party.

Mr. Briski: Michael G. Briski, of counsel with Mr. Ruocco, for plaintiff.

The Clerk: Michael What?

Mr. Briski: G. Briski, B-R-I-S-K-I.

Mr. De Saint Phalle: Richard De Saint Phalle for the defendant. Good morning, your honor.

Your honor may remember that this matter was before you on our Motion for Summary Judgment last spring, and at that point the plaintiff asked leave of court to take certain depositions, which were taken. And we are back here on our Motion for Summary Judgment.

The facts, I think, are fully set out and are undisputed. We had one problem that I should bring to your honor's attention. Should your honor deem the supplemental declaration of Mr. German necessary to dispose of the matter, there was a big fire up in the Six Rivers National Forest, and all of the people up there fought the fire around the clock, and I, therefore, have not yet gotten back the executed copy, although we did submit to the court a draft with a certificate of coun-

sel. And I can have that declaration filed with the court next week.

The Court: All right.

Mr. De Saint Phalle: The facts are quite simple. Mr. Lochner became injured by diving head first into a —

The Court: I am acquainted with the pool incident.

How about this being a resort?

Mr. De Saint Phalle: I don't think that it's even remotely possibly a resort.

The Court: Why not?

Mr. De Saint Phalle: All you have is a government campground which is remote from the area where the place of injury occurred, approximately a quarter mile away.

The Court: What's a resort under the statute?

Mr. De Saint Phalle: Well, a resort under the statute is unclear to me. I believe it must be a commercial establishment. There is absolutely no law or legislative history to guide us, that we are familiar with. The statute is in a chapter of other statutes, one section of which appears to talk about a resort in the common sense way as if it was a commercial establishment.

In any case, one has to maintain a resort before that section applies. And even if one maintained a resort, the attorney general says that the resort has to border on the swimming area. There is no bordering here. It's remote from the area. We don't maintain a resort. All

we do is have a couple of picnic tables and a barbeque pit at a hunter's camp.

The Court: How far away is the creek from the nearest improvement?

Mr. De Saint Phalle: Approximately 400 yards, something in that order.

The Court: Is that about right? There is some indication it seems to be about 300 feet.

Mr. Briski: That's about 300 feet. Two hundred feet from the campground to the Y, and a hundred feet from the Y down to the swimming hole, your honor.

Mr. De Saint Phalle: I think they're yards, not feet. But, in any case, you can't see the swimming area.

The Court: Well, there is an affidavit that indicates what counsel has just said. He described it in feet. Now, I haven't made a survey of this, at least, so I am not sure.

Let's suppose it is 300 feet, is there any evidence the creek has been modified or changed or dammed or that anything has been done to take it out of its natural condition?

Mr. De Saint Phalle: No, your honor, what you have is a natural bedrock area through which water flows. And the creek, the area in which—which is deep enough for people to swim, is a naturally formed thing out of bedrock which is scorped out by the flowing water.

The Court: Who says so?

Mr. De Saint Phalle: That's in some of the depositions that were taken here. It's also in some of the affidavits that are before you. The affidavits indicate

that the state – the state of the creek is in its natural state which it was formed by nature and that no improvements of any kind have been made by the government.

The Court: All right.

Let's hear from your opponent.

Mr. Briski: Good morning, your honor. Michael G. Briski of counsel.

The Court: Is it really your contention of putting in a picnic table or two and a pit toilet within 300 feet of a creek on a national forest to which to admission is charged makes that a resort?

Mr. Briski: Under the definition of the health and safety code, yes, your honor. That particular question –

The Court: What definition?

Mr. Briski: The definition in the health and safety code cited section – excuse me one second, I have it right here, your honor. I have it in my brief. I will refer to it in my brief. I don't seem to be able to put my finger right on it.

Mr. De Saint Phalle: Section 2400 and following, your honor, – 24,00 and following.

Mr. Briski: It's under point 3 of our – or, point 2, I believe, of our brief where we lay out the health and safety code. It's not 24. Section 24050 defines a " 'resort,' as used in this article, means any . . . " place – " . . . any public bathing or swimming place . . . " on a resort – " . . . or resort on a river or stream."

So, by definition, a public swimming place on a stream can classify as a resort.

The Court: Read that again.

Mr. Briski: "A 'resort,' as used in this article, means any public bathing or swimming place or resort on a river or stream."

So it's a public bathing place. The whole intent of this particular code –

The Court: So every creek more than two feet deep, or any body of water that is capable of getting wet in, is, by that definition, a resort, is that right?

Mr. Briski: If you have the amenities. I think the logical – the attorney general opinion when it was asked to construe this –

The Court: Well, it doesn't say anything about amenities, does it?

Mr. Briski: It says "campground." The particular issue why I have cited the attorney general opinion –

The Court: Well, I didn't hear you mention a campground in the definition.

Mr. Briski: No. It's a very broad definition. It's designed to protect swimming hole activities.

The Court: What is a public swimming place?

Mr. Briski: It is where the public, I would say, would be invited or encouraged to come upon, your honor.

The Court: Is the ocean?

Mr. Briski: There is a different code section dealing with the ocean. It could be a resort on the ocean. 2400 (sic) provides – its definition – Article 1 – there are

several different articles here, your honor. Article 1 deals with ocean swimming where you have to have lifeboats handy. It could very well be if the public is encouraged to come into an area, I would say yes. It's a very broad definition. It's designed to protect against the kind of hazard that we have here, because it's designed to protect against wilderness, maybe not natural –

The Court: Is there anything on the premises that invited anyone?

Mr. Briski: The brochure itself.

The Court: I beg pardon?

Mr. Briski: The brochure itself.

The Court: There was a brochure out at one time that said that late spring swimming was available.

Mr. Briski: It says "spring swimming," your honor, by that reading is when the swimming is going to start is in the springtime.

The Court: August is spring then?

Mr. Briski: It starts in spring and extends through the summer, I would say, your honor.

The Court: When you say that swimming is available in the spring, it means that it's available any time thereafter.

Mr. Briski: The testimony of Mr. Sillwell, who was the government employee, as to the use of that swimming hole by the people that frequent the campground, is that it is best used in the summertime.

The Court: He had said that on occasion he had seen a few people in the water.

Mr. Briski: No. It's been more. He and his family, personally twice a week in the summertime, used it. And he defined it as the only good swimming hole in the area.

The Court: It's not a swimming hole, it's a creek.

Mr. Briski: Well, it's a natural swimming hole.

The Court: You keep referring to it as a swimming hole.

Mr. Briski: Well, if you look at the pictures, your honor.

The Court: And there is a certain identity.

Mr. Briski: It is a swimming hole, that's the attraction. That's why they put the campground there.

The Court: It's a creek with a pond, a natural pond in it.

Mr. Briski: Well, and it's referred to as a swimming hole by the people that use it, I believe.

The Court: Well, it may very well be, it may be referred to as Lurline baths by people who use it, but that doesn't add very much to it.

Mr. Briski: Well, I think by the brochure itself and by the common usage, I think it would be considered a swimming hole. It's formed with a natural creek.

The Court: All right.

So we have a creek with something that you can call a swimming hole. And 300 feet away somebody puts up a picnic table, a barbeque pit and a pit toilet.

Now we have a resort?

Mr. Briski: Under the definition, it's quite similar to the Miller case. There it was a natural refuge where they had – and the court there held that the similar kind – that more detailed regulation would apply to a private person who develops that kind of situation. And that was a wilderness situation.

In the Miller case, with this particular–the analogy, and Miller is cited in our points and authorities, quite identical, because that was a lake, and it would be classified as a resort and governed by the law of Illinois. And the development of that, if developed by a private person, it's quite analogous.

The Court: When private persons develop property – first of all, in Miller there was a fee.

Mr. Briski: No, there was no fee to use the –

The Court: There was a fee for admission to the property of the landowner, was there not?

Mr. Briski: No. They did not have to pay to come on to use that. My recollection, these people went down and were coming back to look at some real property, and someone said, "let's go swimming," and they went down to the pier. The fellow that swam and dove off the end had swam there before, but he had never swam off the pier. There was no fee to use that.

The Court: Well, I got the impression from Miller, which I'll admit I didn't read that carefully, that there were advantages to the landowner flowing from the public access to the premises.

Mr. Briski: No.

The Court: Or whether it was by way of fee or invitation for some other reason, I don't recall. I don't

necessarily agree with the rationale of Miller in the first place, but I think there may be a basis for distinguishing.

Well, I have strong sympathy for the plaintiff here, but –

Mr. Briski: Your honor, if I may speak and make a presentation.

First of all, on the submission of the unsigned affidavit, the burden, as we have stated in our points and authorities –

The Court: Well, suppose we struck both the German and the Aus declarations, you still wouldn't have anything left, would you?

Mr. Briski: Yes, we do. We have the issue – we haven't even got to the issue of willful failure to guard or warn. There are arguments.

The Court: There is simply no evidence of any sort of any willful failure to guard or warn.

Mr. Briski: If you look to the facts of the Lostritto case, when this issue was before the California Court as to what would constitute willful under the sightseers statute, we have drawn an analogy showing step by step with the facts of the court in Wilkie and Lostritto, there was a bridge, that was a railroad bridge that was not even a developed park, and the court–and that was the point that was challenged.

The Court: It was an artificial structure.

Mr. Briski: It was an artificial structure to transport trains. This we have a developed campground for public use. The first point is –

The Court: Well, first of all, this Aus declaration was not totally incompetent.

Mr. Briski: I agree. There are two good –

The Court: Aus is perfectly competent to testify to her search of the records and her determination from the records that there have been no prior accidents reported or reflected in the government's record.

Mr. Briski: If she does that, your honor, the rule requires that she attach those affidavits to the declaration so the court can see that that is a true statement. I'm no saying that she cannot do that, but if she has not done it properly, it's not before the court.

The Court: It is before the court that she has checked those records, and that testimony is competent.

Mr. Briski: It's a hearsay statement, your honor. Suppose we were to submit an affidavit that someone has checked the records and has found that there had been numerous accidents?

The Court: Then there would be a conflict, then we'd probably have a triable issue on that point if it were a relevant matter.

Mr. Briski: The fact that there are no accidents, first of all, is not material to preclude –

The Court: We have a number of depositions here, and it is plain that knowledgeable people have no knowledge of any prior accidents of any sort.

Mr. Briski: And that's just the point, you do not have to have one accident. Lostritto

The Court: I will grant you that you don't have to have previously had an accident, that isn't of overrid-

ing importance. Or were there an accident previously, it might raise some additional question.

Mr. Briski: It's a consciousness.

The Court: Without an accident, it requires something else to raise the matter to the potential of some willful or malicious failure to guard or warn. Here, as I say, we have a natural stream. We have natural rocks in a natural stream. We have 300 feet away, by the best circumstance from an area to which admission is free and unencumbered, to a place where there are simply modest camping and picnicking facilities, and with no indication on the ground whatsoever of the availability or solicitation to the use of the stream, or anything of this sort. It is precisely the type of thing that's covered by 846, and it is in no way possible to describe that kind of a facility as a resort under the health and safety code.

Mr. Briski: Your honor

The Court: That being so, the burden of the plaintiff is to establish a willful or malicious failure to guard or warn. And there simply is no suggestion that any such evidence is available in the case.

Mr. Briski: Your honor, if I may speak to that issue.

The Court: To the extent that the Aus declaration speaks as to matters that are beyond their ability to testify to, I am not considering it. I will consider the German declaration, however.

Mr. Briski: I'd object.

The Court: And it will be filed in proper form by the end of next week.

With that in mind, it is apparent that the defendant's Motion for Summary Judgment is well taken, and it will be granted.

Mr. Briski: Your honor—

The Court: Thank you, counsel.

Mr. Briski: I would like to speak to the issue of whether or not Mr. German's declaration may be submitted at all. The ruling of this court when this matter was continued was that counsel for the plaintiff would have to have his points and authorities before the court 20 days beforehand, and the government would have to have their points and authorities and all matters filed 10 days beforehand. This has not been followed, and we'd object to the submission of the points and authorities on the very ruling of the court.

The Court: All right. I have had the benefit of, and I paid close attention to all of your lengthy and able written submission. I sympathize with your position, but there is nothing that I can do about it.

The Clerk: Do you want a Form of Judgment as well as the order, sir?

The Court: Yes. Prepare a Form of Judgment, submit that with the declaration.

Mr. Briski: Could you prepare a transcript on this, please.

Mr. De Saint Phalle: Thank you, your honor.

(Whereupon, this matter was concluded).

CERTIFICATE OF REPORTER

I, the undersigned official reporter of the United States District Court for the Northern District of California, 450 Golden Gate Avenue, San Francisco, California, do hereby certify:

That the foregoing transcript, pages numbered 1 through 16, inclusive, constitute a true, full and correct transcript of my shorthand notes taken as such official reporter of the proceedings hereinbefore entitled, and reduced to typewriting to the best of my ability.

(Signed) JOSEPH M. CASINELLI

APPENDIX B

ORDER OF THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA.

B-1

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JEFFRY W. LOCHNER, *Plaintiff*, v. UNITED STATES OF AMERICA, *Defendant.*	NO. C-80-0027 RHS ORDER GRANTING DEFENDANT'S SUMMARY JUDGMENT MOTION

Defendant's motion for summary judgment having regularly come on for hearing, and having read and considered the papers submitted in support thereof and in opposition thereto, and having heard and considered oral argument, and good cause appearing,

IT IS HEREBY ORDERED that the motion be granted and that summary judgment be entered against plaintiff.

DATED: 05 DEC 1980

ROBERT H. SCHNACKE

UNITED STATES DISTRICT JUDGE

APPENDIX C

JUDGMENT OF THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF CALIFORNIA.

C-1

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

JEFFRY W. LOCHNER,
Plaintiff,

v.

UNITED STATES OF AMERICA,
Defendant.

NO. C-80-0027-RHS

JUDGMENT

For the reasons stated in the Order Granting Defendant's Motion for Summary Judgment filed herein on December 5, 1980, and in open court on the hearing of the motion,

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the plaintiff take nothing and that the action be dismissed with prejudice.

ROBERT H. SCHNACKE

.....

UNITED STATES DISTRICT JUDGE

APPENDIX D

DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFFRY W. LOCHNER, *Plaintiff-Appellant,* vs. UNITED STATES OF AMERICA, *Defendant-Appellee.*	CA NO. 81-4054 DC No. CV80-0027 RHS MEMORANDUM

Appeal from the United States District Court for the Northern District of California
Robert H. Schnacke, District Judge, Presiding
Argued and submitted July 16, 1982

Before: CHOY, SNEED and FARRIS, Circuit Judges.

We affirm the grant of summary judgment.

I.

Recently, in *Donaldson v. United States*, 653 F. 2d 414, 418 (9th Cir. 1981) we held that California Civil Code § 846[1] and California Health and Safety Code §§ 24050-24054[2] do not irreconciliably conflict.

> Since California Health and Safety Code §§ 24050-24054 apply to only a limited type of recreational area – a river "resort" – these provisions can continue as a minor exception to the general rule set forth in California Civil Code § 846 without shedding the protection of landowners that the latter section was intended by the legislature to forge. At most this leaves a small puncture in a broad shield. *Id.*

The district judge determined that the Salt Creek campground could not be considered a "resort" within the meaning of California Health & Safety Code

§ 24050. Accordingly, the court concluded that California Civil Code § 846 applied and that Lochner's action was barred under that section unless he could raise an issue of fact whether the United States willfully or maliciously failed to warn of or guard against the claimed danger. Finding no suggestion of such evidence, the court granted the motion for summary judgment. We affirm.

The campground maintained by the Forest Service is 300 feet from the creek. It is not located "on a river or stream." Unlike *Donaldson*, where the Army Corp of Engineers maintained developed campgrounds, a marina, and boat launching ramps, there is no apparent connection between the primitive campground and the natural swimming hole.

The Salt Creek swimming hole is not an amenity to the campground. It was commonly used by local residents before the campground was developed and its continued use is not in connection with the campground.[3] The United States did not maintain a resort within the meaning of the California Health and Safety Code.

II.

Lochner agrues that if California Civil Code § 846 applies to the United States, it violates his right to equal protection because the distinction it draws between those who do and those who do not pay a consideration for the use of land does not bear a rational relationship to a legitimate state interest. Identical equal protection challenges were made and rejected in *Simpson v. United States*, 652 F. 2d 831, 833-34 (9th

Cir. 1981), *Parish v. Lloyd*, 82 Cal. App. 3d 785, 147 Cal. Rptr. 431 (1978), *Lostritto v. Southern Pacific Transportation Co.*, 73 Cal. App. 3d 737, 140 Cal. Rptr. 905 (1977).

III.

Lochner contends that the facts established by his declarations presented a genuine issue of material fact as to the willfulness or maliciousness of the United States in failing to warn or guard against a dangerous condition, act, structure or activity thereby precluding the issuance of summary judgment. He misunderstands the standard.

To qualify for the exception to California Civil Code § 846 regarding willfulness and maliciousness, a plaintiff must show intentional, wrongful conduct done either with a knowledge that serious injury to another will probably result, or with wanton and reckless disregard of the possible results. *Simpson v. United States*, 652 F. 2d 831, 834 (9th Cir. 1981), *citing O'Shea v. Claude C. Wood Co.*, 97 Cal. App. 3d 903, 159 Cal. Rptr. 125, 130 (3d Dist. 1979).

Lochner points to evidence that employees of the Unted States knew that 1) the swimming hole was used, particularly by local residents, throughout the summer; 2) there were potentially dangerous rocks at one end of the swimming hole; 3) some people jumped into the pool in the vicinity of the rocks; and 4) that the forestry workers had failed to sound for the presence of submerged rocks or to place a sign warning of the danger of diving into the water where rocks might be.

We recognize that where willfulness is an issue, summary judgment should be granted with caution since questions of intent or motive are presented. *Simpson v. United States*, 652 F. 2d. at 834. Our careful review of the record satisfies us that the district court was correct in finding that "[t]here is simply no evidence of any sort of any willful failure to guard or warn."

AFFIRMED.

FOOTNOTES

[1]California Civil Code § 846 provides in pertinent part:

> [1] 846. Permission to enter for recreation purposes
>
> An owner of any estate in real property owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.
>
> . . . .
>
> this section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous conditions, (sic) use, structure of activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.

[2]California Health and Safety Code §§24050-24054 provide:

> § 24050. Resort defined. 'Resort,' as used in this article, means any public bathing or swimming place or resort on a river or stream.
>
> § 24051. Soundings for dangers. No person shall maintain a resort unless he carefully sounds for depth of water and locates the eddies and pools and determines the presence and nature of dangerous currents, sunken logs, rocks, and obstructions in the stream or river.
>
> § 24052. Warning signs. No person shall maintain a resort unless signs indicating in plain letters the depth of water, the location of pools or eddies, the presence and direction of currents of water are placed and maintained in the water during the season when bathing and swimming are permitted or invited.
>
> § 24053. Safety ropes. No person shall maintain a resort unless safety ropes are stretched wherever necessary to show the line of eddies, pools, sunken obstructions, and other hidden dangers to bathers in the water.
>
> § 24054. Violation; misdemeanor. Every person who violates any provision of this article is guilty of a misdemeanor.

[3]*Cf.* 27 Ops. Atty. Gen. 113. (Attorney General of the State of California 1956) in concluding that a picnic area bordering on a stream falls within the definition of a "resort," the opinion states.

> A picnic ground would come within the definition of a resort, since it is a place of frequent assembly and a popular place of recreation. The mere fact that the owner or operator thereof did not have swimming or bathing as a part of the operation of his picnic ground would not be controlling. The test is whether or not he had knowledge that swimming or bathing was taking place in connection with his picnic ground and failed to take action to prevent such swimming or bathing. *Id.* at pp. 114-115.

APPENDIX E

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING REHEARING AND REJECTING SUGGESTION FOR REHEARING EN BANC.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JEFFRY W. LOCHNER,
Plaintiff-Appellant,
v.
UNITED STATES OF AMERCIA,
Defendant-Appellee.

NO. 81-4054
ORDER

Before: CHOY, SNEED and FARRIS, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing, and no judge of the court has requested a vote on it. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX F

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution, Amendment XIV, Section 1:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

California State Constitution, Article 1, Sections 7(a) and 7(b):

"§ 7. *Due process and equal protection; pupil school assignment or transportation; privileges and immunities.*

"(a) A person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws; provided, that nothing contained herein or elsewhere in this Constitution imposes upon the State of California or any public entity, board, or official any obligations or responsibilities which exceed those imposed by the Equal Protection Clause of the 14th Amendment to the United States Constitution with respect to the use of pupil school assignment or pupil transportation. In enforcing this subdivision or any other provision of this Constitution, no court of this state may impose upon the State of California or any public entity, board, or official any public school assignment or public transportation, obligation or responsibility with respect to the use of pupil school assignment or pupil transportation, (1) except to remedy a specific violation by such party

that would also constitute a violation of the Equal Protection Clause of the 14th Amendment to the United States Constitution, and (2) unless a federal court would be permitted under federal decisional law to impose that obligation or responsibility upon such party to remedy the specific violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution.

"Except as may be precluded by the Constitution of the United States, every existing judgment, decree, writ, or other order of a court of this state, whenever rendered, which includes provisions regarding pupil school assignment or pupil transportation, or which requires a plan including any such provisions shall, upon application to a court having jurisdiction by any interested person, be modified to conform to the provisions of this subdivision as amended, as applied to the facts which exist at the time of such modification.

"In all actions or proceedings arising under or seeking application of the amendments to this subdivision proposed by the Legislature at its 1979-80 Regular Session, all courts, wherein such actions or proceedings are or may hereafter be pending, shall give such actions or proceedings first precedence over all other civil actions therein.

"Nothing herein shall prohibit the governing board of a school district from voluntarily continuing or commencing a school integration plan after the effective date of this subdivision as amended.

"In amending this subdivision, the Legislature and people of the State of California find and declare that this amendment is necessary to serve compelling public interests, including those of making the most effective use of the limited financial resources now and prospectively available to support public education, maximizing the educational opportunities and protecting the health and safety of all public school pupils, enhancing the ability of parents to participate in the educational process, preserving harmony and tranquility in this

state and its public schools, preventing the waste of scarce fuel resources, and protecting the environment.

"(b) A citizen or class of citizens may not be granted privileges or immunities not granted on the same terms to all citizens. Privileges or immunities granted by the Legislature may be altered or revoked."

Federal Tort Claims Act, 28 United States Code, Section 1346(b):

"Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and The District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

California Civil Code Section 846:

"*Permission to enter for recreational purposes.*

"An owner of any estate or any other interest in real property, whether possessory or nonpossessory, owes no duty of care to keep the premises safe for entry or use by others for any recreational purpose or to give any warning of hazardous conditions, uses of, structures, or activities on such premises to persons entering for such purpose, except as provided in this section.

"A 'recreational purpose,' as used in this section, includes such activities as fishing, hunting, camping, water sports, hiking, spelunking, sport parachuting, riding, including animal riding, snowmobiling, and all other types of vehicular riding, rock collecting, sight-

seeing, picnicking, nature study, nature contacting, recreational gardening, gleaning, winter sports, and viewing or enjoying historical, archaeological, scenic, natural, or scientific sites.

"An owner of any estate or any other interest in real property, whether possessory or nonpossessory, who gives permission to another for entry or use for the above purpose upon the premises does not thereby (a) extend any assurance that the premises are safe for such purpose, or (b) constitute the person to whom permission has been granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of such person to whom permission has been granted except as provided in this section.

"This section does not limit the liability which otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure or activity; or (b) for injury suffered in any case where permission to enter for the above purpose was granted for a consideration other than the consideration, if any, paid to said landowner by the state, or where consideration has been received from others for the same purpose; or (c) to any persons who are expressly invited rather than merely permitted to come upon the premises by the landowner.

"Nothing in this section creates a duty of care or ground of liability for injury to person or property."

APPENDIX G

UNITED STATES BROCHURE RUSTI-CAMPS SIX RIVERS NATIONAL FOR-EST.

(AS SUBMITTED BY DECLARATION OF DEFENDANT BY ATTACHMENT).

ENCLOSURE # 1
RUSTIC CAMPS
EXHIBIT 4
Six Rivers
National Forest
USFS

Camps listed in this brochure are FREE.

NOTE: Campfire permits are required May 15 through October 31 if using grills, open fires, lanterns, etc., in these rustic camps.

The backcountry primitive camps listed in this booklet are not generally accessible during winter months (approx. November through April) due to snow. We suggest that individuals check with the Ranger Station in the area prior to using these camps for details on how to find the camps, road conditions, etc.

Most of these camps do not have water during dry summer months as springs often dry up.

Lower Trinity Ranger District Page 1-3

Mad River Danger District Page 4-9

Gasquet Ranger District Page 10-11

LOST LAKE

LOCATION: Turn left just past Alder Springs Camp and continue approx. 1 mile. Park and walk down logging spur to left approx. ½ mile – Lost Lake is on the left.

FACILITIES: Table, fire ring, trash sack.

MILLER SPRINGS – Approximately 11 units suitable for tent or trailer. Tables, piped spring water, 2 outhouses. Horses OK.

OAK GROVE

LOCATION: 4 miles south of Hwy. 36 via gravel Forest Service Road 1NO3 on Mad River Ridge.

FACILITIES: 3 units suitable for tent or pickup camper. Tables, grills, spring water 100 yards.

ATTRACTION: Privacy, hunting, June-Nov. Elevation 3800′.

PICKETT PEAK – 1 unit. Table, vault toilet. Boil spring water.

RUTH DAM PICNIC – DAY USE

LOCATION: 7 miles south of Hwy. 36 on paved county road, on Mad River just below Ruth Dam.

FACILITIES: Tables, grills, garbage cans, river water, 2 units.

ATTRACTIONS: Fishing, particularly late season, day use only. Yearlong. Elevation 2500′.

SALT CREEK

LOCATION: 7 miles east of Kettenpom via gravel county road on bank of Salt Creek.

FACILITIES: 1 trailer, 3 tent, tables, grills, vault toilet, creek water.

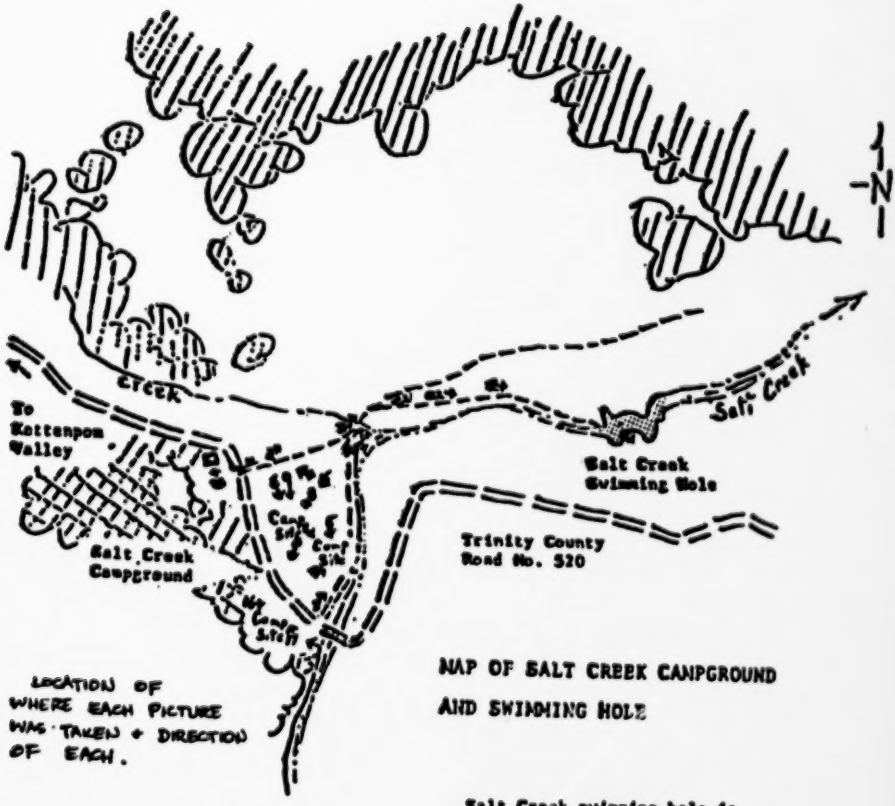
ATTRACTIONS: Steelhead fishing, late spring swimming, fall deer hunting. Not recommended in mid summer. Two week limit. Elevation 2000′.

APPENDIX H

GOVERNMENT MAP OF SALT CREEK CAMPGROUND AND SWIMMING HOLE.

OFFICIAL GOVERNMENT

RE: JEFFREY ADCHNER



MAP OF SALT CREEK CAMPGROUND

AND SWIMMING HOLE

Salt Creek swimming hole is 800 feet from County road 520 when using the foot-path which goes through the campground.